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No. 80-689

IN THE

Supreme Court of the United States

October Term, 1980

GARY E. WIDMAR, *et al.*,

Petitioners,

vs.

CLARK VINCENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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MOTION OF THE
AMERICAN JEWISH CONGRESS
FOR LEAVE TO FILE A
BRIEF AMICUS CURIAE

The undersigned, as counsel for the American Jewish Congress, respectfully move this Court for leave to file the accompanying brief amicus curiae in support of petitioners. Pursuant to S. Ct. Rules 36 and 42, the parties' consent was sought. Counsel for respondents consented to the filing of this brief, but counsel for petitioners declined to do so.

The American Jewish Congress is a national organization of American Jews founded in 1918. Among its major concerns are the preservation and protection of the separation of church and state secured by the Establishment Clause of the First Amendment to the Constitution of the United States. We seek permission to file

this brief because we believe that the decision of the United States Court of Appeals for the Eighth Circuit fundamentally undermines the values inherent in, and the protection afforded by, that clause.

The American Jewish Congress has participated in a large number of church-state cases before this and other courts. It believes that its accumulated experience in this field and its deep commitment to the First Amendment permit it to make a unique contribution to the discussion of the Constitutional issues involved in this case.

Respectfully submitted,

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Question Presented

Does the Establishment Clause of the First Amendment to the United States Constitution prohibit state officials from making governmental facilities, paid for with tax funds, available for religious services?

Statement of the Case

This case was brought by several students, members of a religious group called Cornerstone, (henceforth collectively referred to as Cornerstone) at the University of Missouri-Kansas City to challenge a university rule which prohibits the use of university facilities for purposes of religious worship or study. The case was decided by the District Court on stipulated facts which are summarized in the opinion of the District Court, Appendix at 26.

In brief, the stipulation established that Cornerstone was a religious organization interested in running on-campus prayer and study sessions. It sought permission from school officials to use, without charge, available space for these

purposes on the same basis as such space was made available to other student run activities. The meetings were to be open to the public. It was an essential purpose of these meetings to attract the "uninvolved" so that they might make "a personal decision in favor of trusting in Jesus Christ both for salvation and for the power to live an abundant Christian life on earth."

Acting pursuant to University rule 4.0314.0107 (henceforth "the Rule") school officials denied Cornerstone's request. This suit followed. The complaint alleged that the Rule interfered with respondents' constitutional rights, principally the right of Cornerstone to the free exercise of religion.

Cornerstone introduced the testimony

of two of its members as to the allegedly deleterious effects of the Rule. The thrust of that evidence appears in the testimony of one Florian Chess who stated:

> 8. The program for our Saturday night meetings on campus consisted of Bible study and teaching, prayer, informal sharing, and singing. All are welcome to attend, and, in fact, it is our purpose to attract the uninvolved so that they too might assure themselves that the answers to life's ultimate questions rest with Jesus Christ and the Bible.
>
> 9. We have never had nor sought any official promotion or sanction as to our activities or purposes from the university administration, and we expect no more accommodation than that which is afforded other recognized student groups.
>
> 10. The prohibition against meeting on campus which began in February, 1977, has had a very significant impact on our meetings, on our attendance, and on our ability to maintain the momentum of our outreach to students and faculty.

11. We have continued to meet, of course, but being off campus has had many unfortunate disadvantages:

a) One disadvantage is a loss of visibility and identity as a campus organization. In a real sense, we are no longer a "campus" organization, and it is difficult to interest other students in any activities which are off campus. Students know that if something is on campus, then it is a student organization, and they are more likely to feel comfortable attending a meeting.

b) Another disadvantage is increased confusion. Even though we have begun meeting in a house located only about a block and a half from the campus, students who are not familiar with where we are meeting are not as likely to go to an unfamiliar address on a residential street (Charlotte Street) as they would be to go to a regularly used and well-known campus building.

c) Another disadvantage is decreased comfort. Interested visitors are not encouraged to return by the crowded and uncomfortable conditions that exist at the meetings on Charlotte Street. Not only is the house severely overcrowded, but the house is so constructed that probably no more than about forty percent of those in attendance can see the person speaking even when the speaker stands in the most observable position.

d) Another disadvantage is lack of convenience and efficiency. It is just not as convenient for students to go off campus as it takes more time out of their schedules.

e) Another disadvantage is the burden that it places upon those who host the meetings. We have been having roughly seventy-five people at our regular off-campus meetings.

f) Another disadvantage is that it makes our message and our purposes seem more remote and less relevant to

the typical student. Having to explain that we have to meet off campus tends to make students think that there is something "wrong" with us and that there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This type of thinking is a large barrier to the effectiveness of our message and the purposes of our group.

g) In addition, and also as a result of the above stated factors, we have experienced a definite decrease in the attendance at our activities. We have continued to promote our activities and have continued our efforts to attract other students, but our attendance has been lower since we were forced off campus. We seem to have an average attendance of roughly seventy-five or so at our recent meetings since being forced off campus, and it would be physically impossible for

> us to accommodate many more than now attend. It would be impossible, for instance, to accommodate the one hundred and twenty-five we used to have at some of our campus meetings on previous occasions when we were permitted to meet on campus.

The District Court found all of Cornerstone's arguments unpersuasive and entered judgment for the University. The Court of Appeals reversed, and later denied rehearing en banc, two judges dissenting.

Argument

I. This Case Must Be Decided Solely With Reference to the Establishment Clause

The religion clauses of the First Amendment protecting religious freedom and barring religious establishment, although different in form, both serve to guarantee

religious liberty. This Court, in PEARL v. Nyquist, 413 U.S. 756, 788 (1973); Wisconsin v. Yoder, 405 U.S. 205, 220-21 (1972); and Walz v. Tax Commission, 397 U.S. 664, 669 (1970), has suggested the possibility of situations in which the commands of the two clauses collide. However, this case does not present such a situation.[1/] Instead, it presents for decision the validity of a rule which does nothing more than enforce the Establishment Clause's prohibition on government support for religion. Although that prohibition necessarily inhibits religion, it does not clash, in the legal sense, with the Free Exercise Clause with which

1. This is not a case even remotely similar to those where the government has isolated persons from all access to religious facilities, and may thus constitutionally supply them with a chapel and chaplains. Rudd v. Ray, 248 N.W. 2d 125 (Iowa 1976).

it is linked. Neither does the Rule at issue here.

Respondents may well be more effective in carrying out their religious mission if the Rule is declared unconstitutional. Nor do we doubt that, ordinarily, any governmental policy which interferes with religious activities or which makes effective implementation of religious beliefs more difficult must, under the Free Exercise Clause, serve some compelling governmental interest. Wisconsin v. Yoder, supra; Sherbert v. Verner, 374 U.S. 398 (1963); cf. Healy v. James, 408 U.S. 169 (1972). We submit, however, that that burden need not be borne where, as here, the governmental policy is compelled by the Establishment Clause.

This is hardly novel doctrine. This

Court has repeatedly rebuffed claims that the denial of governmental assistance to parochial schools violates Free Exercise rights. See, e.g., PEARL v. Nyquist, supra, 413 U.S. at 788-89. More to the point, it has likewise given short shrift to the argument that prohibiting school-sanctioned religious ceremonies manifests hostility toward religion. School District of Abington Twshp. v. Schempp, 374 U.S. 203, 225-26 (1963); Engel v. Vitale, 370 U.S. 421, 433-35 (1962). The reason, of course, is that such acts run squarely afoul of the Establishment Clause. As we demonstrate below, Point III, so would granting respondents' request for permission to conduct its religious activities on petitioners' campus.

It is understandable that groups,

like respondents, that face the possibility of limitations under the Establishment Clause should view it as a restriction on their religious beliefs and practices. No doubt it frequently is. But those restrictions are the price of the bargain struck to preserve religious liberty in a society composed of literally hundreds of different religious faiths. McCollum v. Bd. of Educ., 333 U.S. 203, 215-16, n.4 (1948) (Frankfurter, J., concurring).[2/]

The Court below thus erred in equating, for constitutional purposes, governmental aid to religious activity with ordinary free speech principles.

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2. The 1980 Yearbook of American and Canadian Churches lists 222 major religious groups (p. iv) and cites the existence of "thousands of cults and sects" (p. iii).

For constitutional purposes, religious activity is different from non-religious activity, as the very existence of the religion clauses testifies. Religious institutions, for example, are the beneficiaries of special protections not afforded other institutions, and are insulated from much governmental regulation. For example, those who profess religious objections to military service are exempted, but those who hold merely "philosophical" objections are not. Wisconsin v. Yoder, supra, 406 U.S. at 215; Gillette v. U.S., 401 U.S. 437 (1971).

But the First Amendment is not a one-way street. As Judge Adams put it succintly in his concurrence in Malnak v. Yogi, 592 F.2d 197, 213 (3d Cir. 1979), "The rose cannot be had without the thorn."

The constitutional purpose of insulating religion from government and government from religion also forbids government to accord certain types of benefits to religious institutions that it may grant others. Thus, while government may not provide direct or indirect financial aid to parochial schools in any amount, see, e.g., Meek v. Pittenger, 421 U.S. 349 (1975); PEARL v. Nyquist, supra; Lemon v. Kurtzman, 403 U.S. 602 (1971), it may aid nonsectarian schools. It may not provide free space in public buildings for religious groups having no other relationship to the premises, see, e.g., Resnick v. East Brunswick Twshp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978), although it may constitutionally do so for non-sectarian groups such as the Boy Scouts,

Resnick v. East Brunswick Twshp. Bd. of Educ., supra.

For much the same reasons the equal protection claims made by respondents are not relevant to the disposition of this case. Making governmental facilities available for religious services and making them available for non-religious speech are "different" and therefore need not be treated "as though they were the same." See Michael M. v. Superior Ct., U.S. , 49 U.S.L.W. 4273, 4274 (1981).

Also to be distinguished are the cases which hold that, in granting access to public buildings, public officials may not favor one speaker over others on the basis of the content of their speech. See, e.g., ACLU v. Bd. of Educ., 55

Cal.2d 167, 10 Cal. Rptr. 647, 359 P.2d 45, cert. denied, 368 U.S. 819 (1961). Those cases have no relevance here, since the distinction to be drawn between sectarian and non-sectarian speech is required by the First Amendment. Likewise to be distinguished are cases such as Niemotko v. Maryland, 340 U.S. 268 (1951), in which the issue was whether the government could exclude disfavored religions from conducting services in public forums, not whether any such services were permissible.

II. The Challenged Rule Does Not "Establish" Hostility to Religion

Respondents' constitutional claim is premised largely on the litany of complaints contained in the stipulated testi-

mony of Florian Chess.[3/] Those complaints are nothing more than a claim that Cornerstone could carry out its work more effectively if it were granted official status by the University, and that its exclusion from on-campus facilities stigmatizes it. This was alleged to be so both because it was physically more convenient for students to meet on campus, and more importantly, because,

> [The Rule] makes our message and our purposes seem more remote and less relevant to the typical student. Having to explain that we have to meet off campus tends to make students think that

3. Because we agree that, if the Rule is not required by the federal Establishment Clause, it would be unconstitutional under general First Amendment principles -- whether free speech, Healy v. James, supra, free exercise, Wisconsin v. Yoder, supra, or both -- we think that the provisions of the Missouri constitution cannot provide a justification for the Rule.

> there is something wrong with religion since it has been banished from the campus. This leads to the kind of thinking which holds that religion is obsolete and has nothing to do with the realities of life. This kind of thinking is a large barrier to the effectiveness of our message and the purposes of our group. [App. 31-35.]

The Court of Appeals found this last criticism of the rule particularly persuasive. Citing this portion of the record, it concluded that "The University's policy singles out and stigmatizes certain religious activity and, in consequence, discredits religious groups." App. 14. As a result, that Court concluded, the Rule violated the Establishment and Free Exercise Clauses. As already noted, we submit that the Free Exercise Clause has no role to play in this litigation, once it is determined that the Rule implements the

Establishment Clause. We turn therefore to the Establishment Clause, considering first the holding of the Court below that the Rule itself manifested hostility toward religion.

The Court below correctly held that this case is governed by the so-called tripartite test. See, e.g., Stone v. Graham, 101 S.Ct. 190, 193 (1980). For present purposes, it suffices to focus on the two elements of that test discussed by the Court below -- effect and excessive entanglement.

A. Excessive Entanglement

The Court below concluded that the Rule

> hopelessly entangles [the University] in the delicate tasks of defining religion, determining whether a proposed event involves religious worship or teaching,

> and then monitoring events to insure that no prohibited activity takes place. These would be particularly difficult tasks in our contemporary society. [App. 14.]

This reasoning would lead to the invalidation of the First Amendment itself. This Court has held that only religious activities, as distinguished from philosophic beliefs, are entitled to the protection of the religion clauses of the First Amendment. Wisconsin v. Yoder, supra, 406 U.S. at 215. The inquiry into whether a particular practice is religious, while most delicate, has been undertaken by this Court on several occasions, notably in the conscientious objector cases. E.g., Gillette v. U. S., supra; U. S. v. Seeger, 380 U.S. 163 (1965). See also Lemon v. Kurtzman, supra, 403 U.S. at 614,

citing Walz. v. Tax Commission, supra.

Moreover, only religious practices are prohibited under the Establishment Clause. See Florey v. Sioux Falls School District 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 49 U.S.L.W. 3351 (1980). Inevitably, for example, this requires school officials to determine whether a particular practice is religious and therefore prohibited, or non-religious and permissible. Thus, this Court has explicitly held that religious literature such as the Bible may be taught in an objective fashion, but may not be used for opening exercises. School District of Abington Twshp. v. Schempp, supra, 374 U.S. at 224. Determining whether a particular use of the Bible is permissible requires school officials, and ultimately the

courts, to undertake the very inquiry that the Court below believed was constitutionally forbidden.[4/]

B. The Rule Does Not Unconstitutionally Inhibit Religion

The more fundamental error of the Court below occurred in its discussion of the effect branch of the tripartite test. Not only did the Court adopt the "the primary effect" test rejected by this Court in PEARL v. Nyquist, supra, 413 U.S. at 783 n.39, but its determination that the Rule had the impermissible effect of inhibiting and stigmatizing religion (see p. 17 supra) would eviscerate the Establishment Clause, for as we have noted, the

4. See Wiley v. Franklin, 468 F.Supp. 133 (E.D. Tenn.), on reconsideration, 474 F.Supp. 525 (E.D. Tenn. 1979) on further consideration, 497 F.Supp. 390 (E.D. Tenn. 1980).

Establishment Clause was designed to inhibit certain religious activity. The Rule does not inhibit religion beyond what the Constitution demands.

The history of the Establishment Clause has often been recounted in this Court's opinions. PEARL v. Nyquist, supra; Engel v. Vitale, supra; McCollum v. Bd. of Educ., supra; Everson v. Bd. of Educ., 330 U.S. 1 (1947). Undoubtedly, all those who supported the principle of disestablishment in this country did not do so for the same reasons. Some, like Thomas Jefferson, were concerned primarily with the protection of the state from religious influences. Others, like Roger Williams, wished to protect the church. Still others, chiefly James Madison, wished to protect both. Brandon v. Bd. of Educ., F.2d

(2d Cir. 1980), petition for certiorari filed, No. 80-1396. It is beyond question, however, that there was agreement on the need to limit the government's identification with religion. Maintenance of a clearly perceived delineation between church and state requires a prohibition not only of explicit aid to religion (such as a formally established church) but of those practices which create the impression of identification. The Establishment Clause thus singles out religion but it does not, as the Court below concluded, stigmatize religion. It is, of course, absurd to suggest that the First Amendment violates its own commands.

Behind the calmly phrased legal arguments in this case lies a broader, more heated argument. The separation of

church and state is not merely a matter for lawyers and political scientists. Churches and theologians have also debated the proper relation between the two. Not all religious groups are theologically comfortable with the separation principle, for it means that there is a sphere of activity where religion has no place. It must be admitted that the Establishment Clause does limit religion's role in our society. It places a limit on the influence that religion can have on governmental policy. But, as interpreted and applied by this Court, it does so not from hostility to religion but, as Justice Clark remarked in Engel v. Vitale, supra, in order to protect religion from misuse by government, and more importantly, because in this multi-cultural society it

simply can be no other way.[5/]

We agree, of course, that a governmental practice or regulation not required by the Establishment Clause which inhibits religion is unconstitutional under that Clause unless justified by some compelling state interest. But, as we demonstrate in the following section of this brief, the restrictions contained in the Rule are constitutionally required and do not, therefore, unconstitutionally inhibit religion.

III. The Establishment Clause Prohibits A Tax-Supported and State-Operated University from Providing Space to a Religious Group for Worship and Promotion of Religion

5. We do not mean to suggest that religious groups and leaders cannot participate fully in the debate on public issues. McDaniel v. Paty, 435 U.S. 618, 640-41 (1978) (Brennan, J., concurring); Walz v. Tax Commission, supra, 397 U.S. at 670.

In the present case, there are five essential facts:

1. Cornerstone's attempt to use a tax-supported public university's facilities for regular religious worship.

2. Cornerstone's proselytism and its desire to spread its religious beliefs.

3. Cornerstone's attempt to obtain financial and physical support from a tax-supported public university.

4. Cornerstone's efforts to gain the imprimatur of the University for its religious program because it believes that imprimatur will materially advance its ability to carry out its mission.

5. Cornerstone's desire to be recognized in order to counter "the kind of thinking which holds that religion is

obsolete and has nothing to do with the realities of life."

We submit that these facts compel the conclusion that permitting Cornerstone to conduct its program on the University of Missouri campus would not be constitutionally permissible.

The Establishment Clause, in the words of Justice Black "means at least" that

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another .... No tax in any amount, large or small can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion ....

Everson v. Bd. of Educ., supra, 330 U.S. at 15-16.

In view of the evils that the First Amendment was designed to suppress, its prohibition of religious establishments goes far beyond merely forbidding a national or state church and includes all "steps that could lead to such establishment." Lemon v. Kurtzman, supra, 403 U.S. at 612.

A. The Rule Properly Forbids The State from Extending Financial Assistance to Religion

Should the University of Missouri be forced to allow religious groups to use its facilities for religious worship and teaching, as it would if the Rule were invalidated, public funds would be channeled to the aid of religion. This specific form of aid, as this Court said in Hunt v. McNair, 413 U.S. 734, 743 (1973), will "normally be thought to have a primary

effect of advancing religion ... as it funds a specifically religious activity in an otherwise substantially secular setting."

We submit that the District Court's decision was correctly anchored on Tilton v. Richardson, 403 U.S. 672 (1971), which focused on the "advancement of religion" resulting from the use of tax-supported public university buildings for religious purposes. The issue in that case was the constitutional validity of federal grants to church-related educational institutions. Under the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended, 20 U.S.C. §§ 711-721, federal financial aid was granted to educational institutions by way of construction grants for buildings and facilities designed to be used only

for secular educational purposes. The Act provided, however, that the limitation to secular use would expire after 20 years. This Court held that this provision had the direct effect of aiding religion and that it therefore violated the Establishment Clause. It said:

> It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribuiton of some value to a religious body .... If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

403 U.S. at 683.

This decision establishes that allowing use of university space created with tax funds for religious worship and

study would have a direct and substantial effect of advancing religion. In both Tilton and the present case, the critical fact is the same -- the use, for religious worship and study, of facilities in a tax-supported institution of higher education.

The Court below distinguished Tilton on the ground that it was concerned

> that a sectarian college would be granted exclusive control of a government financed building on its campus and could devote that building to its own religious purposes. The neutral accommodation by a public university of students whose activities are religious is far different than the total dedication of government funded buildings to a sectarian institution for sectarian purposes.

These distinctions are untenable. The statutory prohibition on sectarian instruction or religious worship applied to both sectarian and public universities

which accepted federal construction grants. More importantly, the statutory prohibition, subsequent to Tilton, on sectarian uses is total, and applies to any such use. It could not be otherwise, for the Constitution forbids any financial aid to religion.

Such aid has been found impermissible in a series of lower federal and state court cases involving high school religious clubs. Brandon v. Bd. of Educ., supra; Hunt v. Bd. of Educ., 321 F.Supp. 1263 (S.D. W. Va. 1971); Trietley v. Bd. of Educ., 65 A.D. 2d 1, 405 N.Y. Supp. 2d 912 (4th Dept. 1978); Johnson v. Huntington Beach Union H. S. Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, (Fourth Dist.), cert. denied, 434 U.S. 877 (1977). Contra: Lubbock Civil Liberties Union v.

Lubbock Independent School District, F.Supp. , C.A. 79-1194 (N.D. Texas 1980), appeal pending, 80-2384 (5th Cir.); Cf. Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965), cert. denied, 382 U.S. 957 (1965).

The Court below recognized that permitting Cornerstone to meet on campus constituted "financial support" but found the amount "would be minimal." It based its reversal of the District Court decision on this Court's statement in Walz v. Tax Commission, supra, 397 U.S. at 668, that, for those who wrote the First Amendment, "the establishment of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." It apparently believed that such minimal support was not

proscribed under Walz v. Tax Commission, supra. We submit, however, that Walz established no de minimis rule. Since Everson v. Bd. of Educ., supra, this Court has stated and restated the principle that "No tax in any amount, large or small, can be levied to support any religious activities or institution ...." Tilton v. Richardson, supra, 403 U.S. at 680. And, unlike the financial aid to institutions of higher education in Roemer v. Bd. of Public Works, 426 U.S. 736, (1976); Hunt v. McNair, supra, 413 U.S. 734 (1973); and Tilton v. Richardson, supra, in which this Court was able to determine that none of the state funds flowed to a "specifically religious activity," Roemer v. Bd. of Public Works, supra, 426 U.S. at 759-60, the aid here flows directly to religious activities.

In any case, the financial aid sought by Cornerstone is not negligible. The immediate practical advantages flowing from use of University property would certainly be more substantial than those found invalid in Tilton -- possible use of such property more than 20 years in the future. They include the costs of heating, lighting and maintenance as well as the "rental value" of the space. Indeed, PEARL v. Nyquist, supra, 413 U.S. at 774-80, invalidated as an establishment, a New York scheme designed to assist parochial schools in meeting maintenance expenses 6/

6. Likewise, in Roemer v. Bd. of Public Works, supra, 426 U.S. at 760, this Court noted with evident approval a rule which prohibited the use of state funds for the maintenance or repair of a building used for "religious worship or for any religious activity."

defined to include heating, lighting and maintenance costs.

Moreover, more is involved than the benefit to this one group. If petitioners, voluntarily or under compulsion of judicial decree, granted Cornerstone's request, it would have to give equal treatment to all other religious groups requesting it. Niemotko v. Maryland, supra. This would certainly constitute a substantial, tangible drain on the public treasury and therefore the taxpayers of Missouri.

B. Cornerstone Impermissibly Seeks to Achieve Governmental Approval

Although the Establishment Clause prohibition on financial aid is sufficient reason to uphold the validity of the Rule,[7/] there is an even more compelling

7. Although we believe that the Rule's prohibition on the use of university facilities is constitutionally compelled, that much of the Rule

reason. Cornerstone seeks, and invalidation of the Rule would result in, government's imprimatur on its activities. Cornerstone sought recognition not only because it would be more convenient for students to attend its meetings if they were held on campus, but in order to convey its message to other students "that religion is [not] obsolete and [that it] has ... to do with the realities of life." It argued that this governmental ratification of its religious beliefs would make it a far more effective religious organization.

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which permits university officials to offer officially approved prayers at specified occasions is undoubtedly unconstitutional. The University is forbidden to sponsor all religious activities, not just those which do not meet with its approval. Moreover, "it is no business of government to compose official prayers for any group of the American people." Engel v. Vitale, supra, 370 U.S. at 425.

That the granting of such approbation is not the proper role of government vis-a-vis religion is obvious. This Court held, for example, only this term in Stone v. Graham, supra, 101 S.Ct. at 194, that the posting of the Ten Commandments (even in the absence of any state expenditure) established religion by "provid[ing] the "official support of the State ... Government" that the Establishment Clause prohibits. [School District of Abington Twshp v. Schempp, supra, 374 U.S.] at 222, see Engel v. Vitale, 370 U.S. 421, 431 (1962)." The posting did so by suggesting that school children should "read, meditate upon, perhaps ... venerate and obey" the Commandments. Stone v. Graham, supra. Similar reasoning underlies the decisions in School District of Abington Twshp.

v. Schempp, supra, and Engel v. Vitale, supra. It is precisely such approval that Cornerstone seeks. Surely, it cannot be doubted that the University could not recognize the Presbyterian Church, for example, as the official school religion. Although different in degree, recognition of Cornerstone is no less objectionable.

There is no better proof that such an imprimatur exists than respondents' own admission to this effect. They are, however, not alone in perceiving the existence of such an impermissible effect. All but one of the courts which have considered the validity of similar rules in the high school context have concluded that it is constitutionally impermissible to allow religious clubs to meet on school grounds because the state would be perceived as

endorsing religion.[8/] See pp. 32-33 supra.

The result in those cases, we submit, is compelled by this Court's holdings in Zorach v. Clausen, 343 U.S. 306 (1953); and McCollum v. Bd. of Educ., 333 U.S. 203 (1948). Together, these cases hold that public institutions of education may not be made available for religious education or worship:

> This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks are paid by the religious organizations. The case is therefore unlike McCollum v. Board of Education, which involved a "released time" program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting

> its free exercise. (footnotes omitted)

Zorach v. Clausen, 343 U.S. at 308-09.

CONCLUSION

The position urged by Cornerstone is but one reflection of the views of that part of the population which disagrees generally with the interpretation placed by this Court on the Religion Clauses of the First Amendment. There are many who hold, sincerely and even passionately, that government institutions may and should be used to foster their religious tenets or, at least, some generalized form of religion. To the extent that persons holding this view urge that the Constitution should be amended to embody it, they are acting well within our constitutional traditions. To the extent, however, that

they urge that the First Amendment be rewritten by the courts to mean something not intended by its draftsmen, they are wrong.

We submit that the decision below constitutes such a rewriting. Its affirmance would signal a grave impairment of the protection which the Religion Clauses now give to all religious groups. It should therefore be reversed.

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